

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND

Office of Zoning and Administrative Hearings
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Rockville, Maryland 20850
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IN THE MATTER OF:
TRICAPITAL PARTNERS, LLC,

Applicant

Alfred Blumberg
Jeffrey Lewis
Robert LoPinto

For the Application

William Kominers, Esquire

Attorney for the Application

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Zoning Application No. G-821

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Application No. G-821, filed on February 23, 2004 by Applicant TriCapital Partners, LLC, requests reclassification from the R-60 Zone to the R-T 8 Zone of 2.00 acres of land known as Lot 2, Seibel's Subdivision and located at 3961 Greencastle Road in Burtonsville, Maryland, in the 5th Election District.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("MNCPPC") who, in a report dated September 3, 2004, recommended *approval*.¹ The Montgomery County Planning Board ("Planning Board") considered the application on September 9, 2004 and, by a vote of 4 to 0, recommended *approval*. A public hearing was convened on September 27, 2004, at which time the Applicant presented evidence and testimony in support of the application. No opposition was presented at the hearing and none is reflected in the file. The record was held open for two weeks to receive a supplemental submission regarding school capacity, and closed on October 11, 2004.

II. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter. Where there are conflicts in the evidence, these conflicts are resolved under the preponderance of the evidence test.

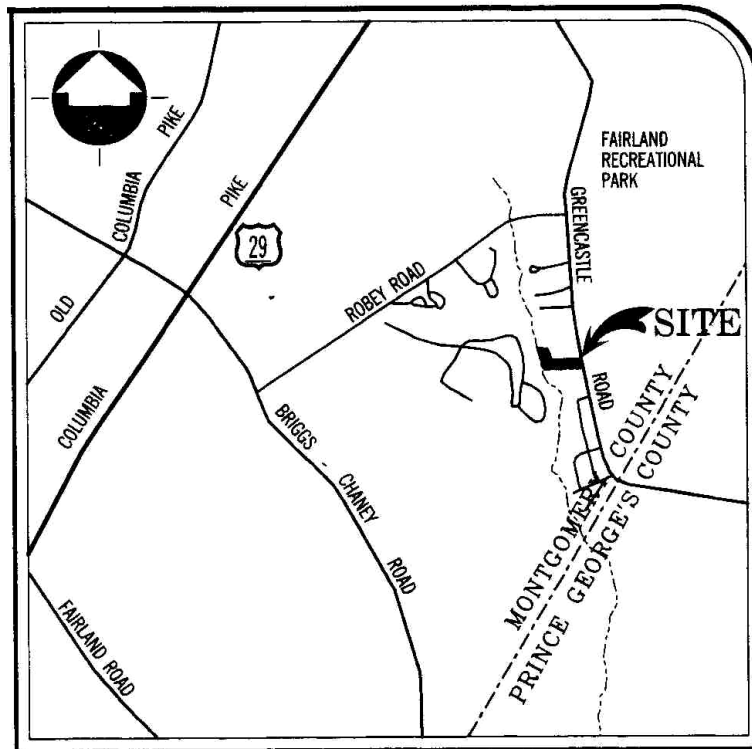
A. Subject Property

The subject property measures approximately two acres and is located on the west side of Greencastle Road, south of Route 29 and north of the county line, near Burtonsville. The property is roughly L-shaped, with a depth of approximately 450 feet and about 150 feet of frontage on Greencastle Road. It is classified under the R-60 Zone and is currently developed with a single-family home and a driveway providing access to Greencastle Road. The rear portion of the property is wooded, and slopes steeply down toward a small stream that flows through the property, running

¹ The Staff Report is quoted and paraphrased liberally in Part II of this report.

north to south along the western property line. The stream is an unnamed tributary to the Little Paint Branch. The rear of the property is unbuildable due to the stream buffer and 100-year floodplain.

The general location and shape of the subject property are shown on the area map below (excerpted from Ex. 27).



B. Surrounding Area

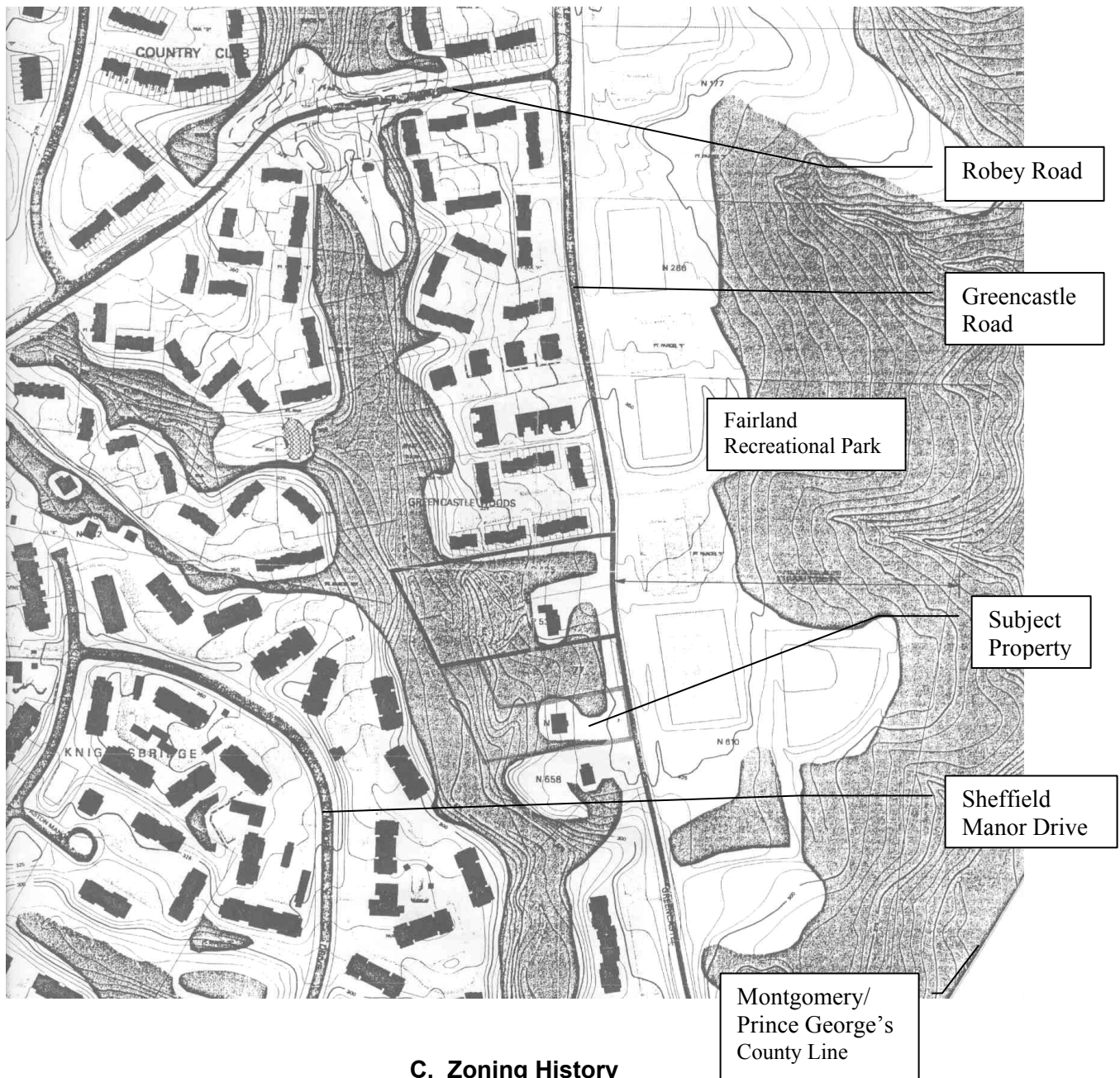
The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff recommended designating a surrounding area bounded generally by Greencastle Road and the Fairland Recreational Park on the east, Robey Road to the north, Sheffield Manor Drive to the west, and the Prince George’s County line to the south. Staff Report, Ex. 25 at 2. The Applicant’s land planner suggested nearly the same surrounding area, except that he would take Greencastle Road as the dividing line and exclude Fairland Recreational Park. See Ex. 18(a) at 4. The Hearing Examiner is inclined to agree with Technical Staff that the

portions of Fairland Recreational Park confronting the subject property should be considered part of the area likely to be affected by the proposed reclassification and development. Accordingly, the surrounding area for the subject application is designated as the area bounded generally by Greencastle Road and Fairland Recreational Park on the east, Robey Road to the north, Sheffield Manor Drive to the west, and the Prince George's County line to the south.

The surrounding area east of Greencastle Road is occupied by open space and athletic fields within Fairland Recreational Park, under the RE-2 Zone. These areas are screened from view from Greencastle Road by landscaping. The surrounding area west of Greencastle Road is developed with high density residential uses consisting mostly of garden apartments and condominiums in the R-30 Zone. The parcels closest to the subject property, including abutting properties and those within 1,500 feet, are either developed with townhouses or expected to be developed with townhouses. The property immediately north of the subject property is classified under the R-30 Zone and is the subject of an approved preliminary plan of subdivision for condominium townhouses. That property is currently under contract to a developer who is planning to develop townhouse condominiums on that property, the property adjacent to it to the north (which is the subject of an approved subdivision plan under the R-T 8 Zone), and the property abutting the subject property to the south (which is the subject of an approved site plan under the R-T 8 Zone). The next property to the north on Greencastle Road contains an existing townhouse development in the R-T 10 Zone. The rest of the surrounding area west of Greencastle Road consists of multi-family housing in the R-30 Zone. The subject property is the last remaining parcel in the surrounding area classified under a single-family residential zone.

The surrounding area for the subject application and prevailing land use patterns can be seen on the vicinity map reproduced on the next page.

Vicinity Map, Excerpted from Ex. 30

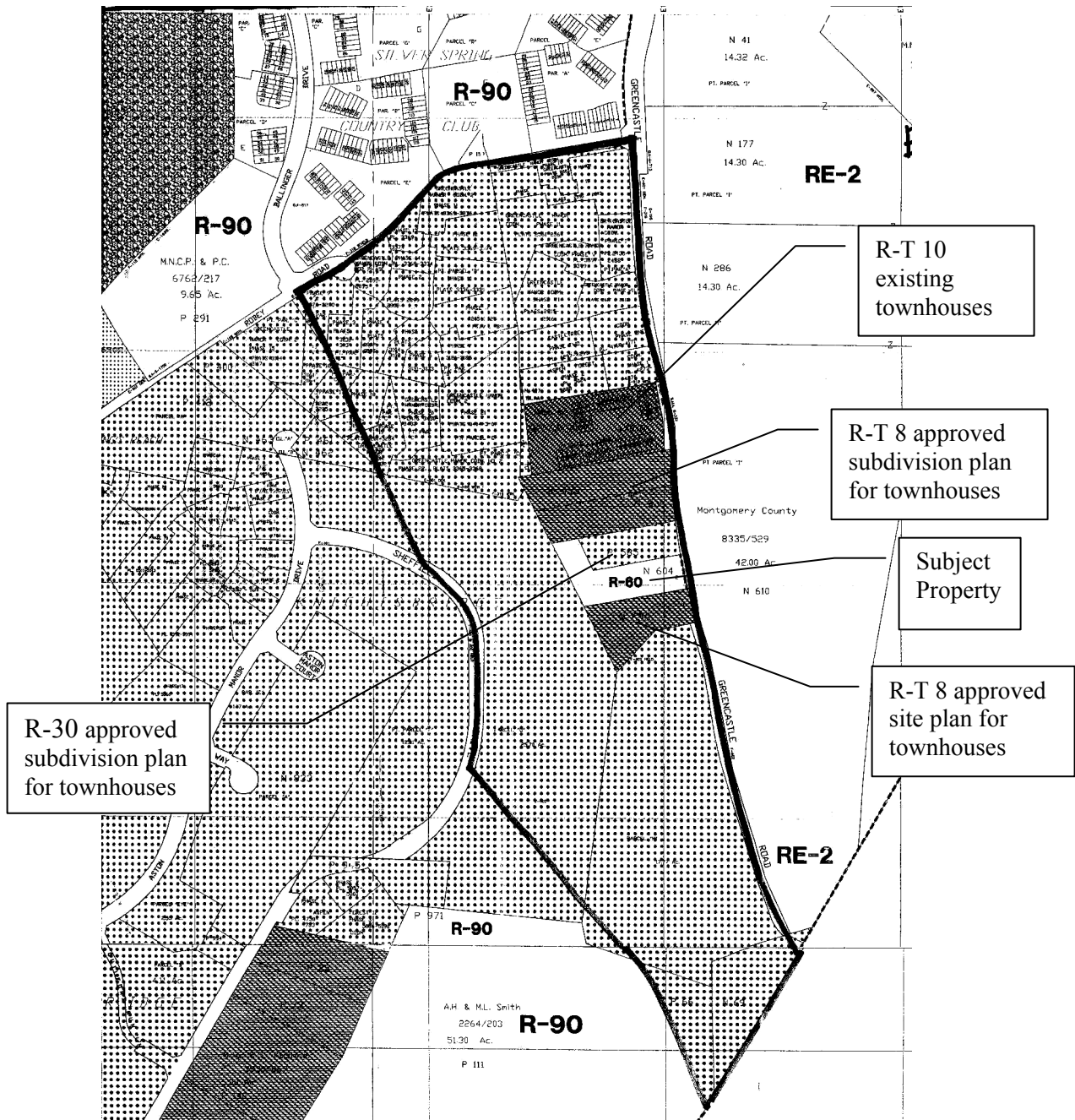


C. Zoning History

Technical Staff reports that the subject property is depicted in the R-60 Zone in the County's 1958 Zoning Map. The subject property was subdivided as a single residential lot in 1957, Lot 2 of Seibel's Subdivision. Seibel's Subdivision consisted of two 2-acre lots, Lot 1 and Lot 2. The MNCPPC sought to reclassify both lots to the R-T 8 Zone by sectional map amendment in 1997, as part of its implementation of the *1997 Approved and Adopted Fairland Master Plan*. This effort was

only partially successful, because the owner of Lot 2 (the subject property) refused to consent to the reclassification due to concerns about property tax increases. As a result, Lot 1 of Seibel's Subdivision was reclassified to the R-T 8 Zone by SMA G-747, and the subject property remained in the R-60 Zone. Prevailing zoning patterns may be seen on the zoning vicinity map below.

Zoning Vicinity Map, Excerpted from Ex. 29



D. Proposed Development

The Applicant proposes to build townhouses on the subject property. Under the requested R-T 8 zoning, a two-acre site normally would be permitted to have up to 16 townhouses. In this case, the rear portion of the site is entirely occupied by flood plain and stream valley buffer areas in which no development is permitted. The Applicant would be permitted to cross the conservation area to connect to an existing sewer line if necessary, but no other building activity would be permitted. The buildable portion of the property, therefore, is significantly smaller than two acres and is very unlikely to actually accommodate 16 dwelling units. The Applicant's representative acknowledged this, and both he and the Applicant's land planner testified that the site could be viably developed with townhouses, even taking into account the environmental constraints. Details about the configuration of the development would be determined during subdivision and site plan review.

The map below depicts existing site conditions, including the location of the existing home and stream valley buffer. All construction would occur east of the stream valley buffer.

Existing Conditions, Excerpted from Ex. 27



E. Master Plan

The subject property is located within the area covered by the *1997 Approved and Adopted Fairland Plan* (the “Master Plan”). The property is located in the “Greencastle/Briggs Chaney” neighborhood, in Area 12, which consists of four parcels and seven acres of land fronting on Greencastle Road, across from Fairland Recreational Park. Area 12 is depicted in Figure 19 of the Master Plan, which is excerpted on the next page. The Master Plan makes the following recommendations for Area 12 (page 44):

- Suitable for a mix of detached and townhouse development; rezone from R-30 to R-60; suitable for townhouses, RT-8.
- Provide connections to open space in adjacent properties to expand open space along tributaries to the Little Paint Branch.
- Incorporate stream buffer areas in open space.
- Require appropriate setbacks and noise mitigation along Greencastle Road.

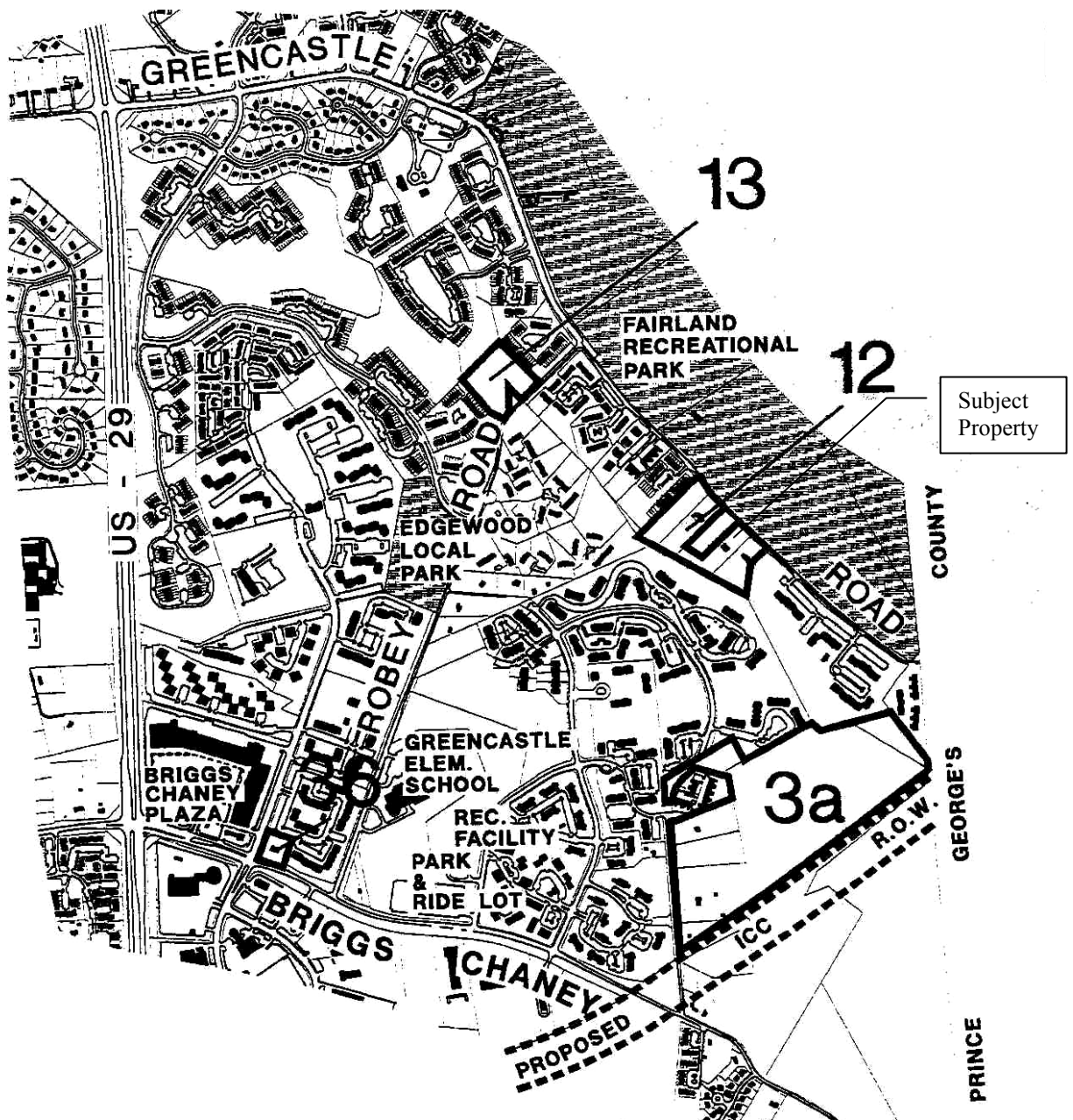
Owners of three of the properties in Area 12 requested reclassification to the R-T 8 Zone as part of a Sectional Map Amendment that followed the adoption of the Master Plan in 1997. As noted in Part II.C above, the owner of the subject property objected to rezoning at that time, due to concern about higher property taxes. Technical Staff reports that the Planning Board recently approved townhouse development for two properties on either side of the subject site. See Ex. 26. These development include an open space network that follows the stream buffer and tributary. See *id.* Staff notes that development of the subject property should carry forth the same treatment in conformance with Master Plan recommendations.

The Applicant’s land planner, Alfred Blumberg, opined that as the sole remaining remnant of R-60 land, the subject property is completely out of character with the surrounding area. Mr. Blumberg concluded that the proposed zoning change would implement the recommendations of the Master Plan and bring the property into conformance with existing and approved development in the surrounding area. He testified that the proposed development would comply with the Master Plan’s open space and stream valley buffer recommendations by placing the rear (western) portion of the property into a conservation easement that would connect to similar conservation areas on

adjacent properties. Both Mr. Blumberg and the Applicant's representative testified that the proposed development would comply with the connectivity, open space and noise mitigation recommendations stated in the Master Plan, with the details to be established during site plan review.

Technical Staff echoed Mr. Blumberg's findings, concluding that the proposed reclassification and development would be consistent with the Master Plan.

Greencastle/Briggs Chaney Neighborhood and Area 12
Excerpted from Master Plan at 43, Fig. 19



F. Development Standards for the Zone

Consistent with the standard method application, the case at hand is presented without a site plan or binding elements. Technical Staff notes that the subject property exceeds the minimum tract area for the R-T 8 Zone, and that the development would be required to satisfy all of the other development standards for the zone at the time of subdivision and site plan review. These standards include a maximum of 35 percent building coverage, a minimum of 50 percent green area, and at least two parking spaces per dwelling unit. The Applicant's land planner opined that a viable townhouse development can be built on the subject property that would meet or exceed the development standards for the Zone, even taking into account the size of the conservation area.

G. Public Facilities

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), the Planning Board has the responsibility, when it reviews a preliminary plan of subdivision, to assess whether the following public facilities will be adequate to support a proposed development: transportation, schools, water and sewage facilities, and police, fire and health services. The Planning Board's application of the APFO is limited by parameters that the County Council sets each year in the Annual Growth Policy ("AGP"), described further below.² While the ultimate test under the APFO is carried out at subdivision review, evidence concerning adequacy of public facilities is relevant to the District Council's determination in a rezoning case as to whether the reclassification would serve the public interest.

1. Transportation

In the present case, Transportation Planning Staff at the MNCPPC indicated that the proposed rezoning would be in compliance with the Master Plan, and that "APF issues, if any, related to the subject property will be addressed at the time of subdivision (Preliminary Plan)." Transportation

² See *Introduction to the Adequate Public Facilities Ordinance and the Annual Growth Policy*, FY 2003 Annual Growth Policy at 6. The Hearing Examiner hereby takes official notice of the text of the AGP.

Planning Memorandum dated September 2, 2004, attached to Staff Report, Ex. 25. Technical Staff recommended approval of the subject application.

Under the provisions of the Fiscal Year 03-05 AGP Policy Element,³ subdivision applications are subject to Local Area Transportation Review (“LATR”) requirements.⁴ LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. An LATR traffic study is not required, however, unless a proposed development would generate 30 or more peak-hour automobile trips.⁵ The number of trips expected from a particular development typically is estimated based on trip generation rates set forth in the Planning Board’s LATR Guidelines. In this case, the Applicant’s land planner applied the Planning Board’s trip generation rates to the maximum of 16 townhouses that could be permitted on the subject property. He concluded that 16 townhouses would generate eight vehicle trips during the morning peak hour and up to 13 trips during the evening peak hour, well below the 30-trip threshold that triggers LATR requirements. Accordingly, a traffic study has not been prepared in this case.

Both Technical Staff and Mr. Blumberg provided information about improvements to Greencastle Road that are programmed in the County’s Capital Improvement Program. Planned improvements would bring Greencastle Road up to county standards for a two-lane arterial road in the vicinity of the subject property, including curb and gutter, separate bike lanes and sidewalks and an 80-foot right-of-way. A small dedication would be required from the subject property to contribute to that right-of-way. Mr. Blumberg stated that the site design would accommodate this dedication, just as other developments on Greencastle Road have done. He also testified that the planned changes would improve the safety and capacity of the road, which would more than accommodate the traffic anticipated from the subject property.⁶

³ The Hearing Examiner hereby takes official notice of the FY03-05 AGP Policy Element, adopted on October 28, 2003.

⁴ See FY03-05 AGP Policy Element at 7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* (“LATR Guidelines”) at 1. The Hearing Examiner hereby takes official notice of the LATR Guidelines.

⁵ See FY03-05 AGP Policy Element at 7.

⁶ The Hearing Examiner notes that Mr. Blumberg was not qualified as an expert in transportation planning or traffic engineering, so a question could be raised as to whether his testimony on this point should be considered

2. Utilities

The subject property is currently served by public sewer and water that would be available to the new development and adequate for its needs. See Ex. 18(b). Testimony indicated that the proposed development would connect to a water line that runs along the property's Greencastle Road frontage, and for sewer service would either connect directly to an existing sewer main in the northwest corner of the site, or connect through the abutting property to the south, which would avoid crossing the stream valley buffer. Electric and telephone service are available via overhead lines along Greencastle Road. The appropriate utility companies have assured the Applicant of service when application is made.

3. Schools

The subject property is located within the Greencastle Elementary School and Benjamin Banneker Middle School service areas. At the high school level, the property is in the Northeast High Schools Consortium, where students are permitted to choose among three high schools, Paint Branch, Blake and Springbrook. Montgomery County Public Schools ("MCPS") reports that the maximum of 16 units proposed is expected to generate approximately four elementary, two middle and three high school students. See Ex. 31. MCPS expects enrollment at Greencastle Elementary School and Banneker Middle School to remain within each school's rated capacity over the six-year forecast period. *Id.* Enrollment is expected to exceed capacity for the six-year forecast period at two of the three high schools within the Northeast Consortium, and to remain within capacity at the third. Per the FY03-05 AGP Policy Element, the current AGP schools test finds capacity adequate in all Northeast Consortium clusters.

expert testimony. Given the small number of trips at issue here, the Hearing Examiner finds that even if Mr. Blumberg's testimony concerning traffic issues were considered that of an educated lay person, it would be adequate, in the present case, to meet the Applicant's burdens of production and persuasion. Accordingly, we need not reach the issue of the proper characterization for that testimony as expert or lay.

H. Environment and Stormwater Management

The subject property includes approximately 1.19 acres of forest. Environmental Planning Staff at the MNCPPC report that the large area of forested stream valley buffer on the property would satisfy the site's forest conservation requirements. See Environmental Planning Staff memorandum dated July 23, 2004, attached to Staff Report, Ex. 25.

The Applicant would be required to submit a stormwater management plan to the Department of Permitting Services for approval, prior to approval of the preliminary plan of subdivision. Technical Staff note that the high densities and lack of available land on which to place regional stormwater facilities in the lower reaches of the Little Paint Branch watershed make it difficult to mitigate degraded conditions in lower tributaries. *Id.* Technical Staff anticipate that stormwater management for the subject site would be provided underground, and the Applicant's engineer testified that stormwater management could be accomplished on-site.

I. Community Support

The record in this case contains three letters in support of the requested rezoning. Stuart Rochester, Chair of the Fairland Master Plan Citizens Advisory Committee, writes that the CAC supports the present application. See Ex. 15. He notes that the subject property is recommended for R-T 8 zoning in the Master Plan, and that the CAC "remains concerned about the cumulative impact of additional townhouse units in Fairland given the Plan's goal to achieve more high-end housing to balance the planning area's housing mix, and also the continuing and serious overcrowding of schools at every level in the planning area, but in this instance we believe the proposed RT-8 rezoning is justified." Ex. 15.

Patrick Zilliacus, a member of the Fairland CAC since 1992, wrote on his own behalf. See Ex. 20. He strongly endorses the proposed rezoning, stating that it would be consistent with nearby townhouse development and should "increase the stock of owner-occupied homes on the east side of U.S. 29 – a longtime personal goal of mine." *Id.* He also notes that the Master Plan recommends the subject property for townhouse use under the R-T 8 Zone.

Thomas D. Fleury, Senior Vice President of the West Group and a business/developer representative to the CAC since 1992, wrote on his own behalf, as an individual with 30 years of planning and development experience. See Ex. 21. He recalls the unsuccessful effort to reclassify the subject property by sectional map amendment, and supports the proposed rezoning as part of “tidying up” the Master Plan.

III. SUMMARY OF TESTIMONY

A. Applicant’s Case in Chief

1. Al Blumberg, land planner

Mr. Blumberg was designated an expert in land use and land use planning. He testified that he prepared a feasibility study for the use of the subject property in the RT-8 Zone. This entailed reviewing the Master Plan, the Zoning Ordinance and subdivision regulations, water and sewer availability, forest conservation requirements, environmental guidelines and local area transportation guidelines. Mr. Blumberg prepared a land use and zoning analysis that was submitted as part of the present application, as well as a supplemental report addressing schools, utilities and traffic.

Mr. Blumberg described the location and current zoning of the subject property. He noted that it is two acres in size and has approximately 150 of frontage along Greencastle Road, with a depth of approximately 450 feet. The property is currently developed with a single-family residence built in the 1950s or 1960s, plus a driveway off Greencastle Road. A small tributary to the Little Paint Branch flows through the back of the property, along its western edge. Most of the area occupied by the stream valley buffer associated with that stream is forested.

Mr. Blumberg’s opinion regarding the appropriate surrounding area for the subject application was very similar to the surrounding area described by Technical Staff. Mr. Blumberg explained that he thought the Technical Staff had recommended the same surrounding area designation that he recommended, placing the western boundary along Greencastle Road. He considers Greencastle Road to be a significant edge to the residential neighborhood, noting that there

is no direct access from in the area of the subject property from Greencastle Road to the recreational activities in the park across the street. He added, however, that if one were to define the surrounding area to include the park, that would not change his conclusion that the proposed rezoning and development would be compatible with the surrounding area. Mr. Blumberg noted that almost all of the surrounding area west of Greencastle Road is already developed with townhouses, garden apartments and condominiums in the R-30, R-T 8 and R-T 10 Zones. He opined that the development proposed in this case would not be incompatible with surrounding uses, and that the recreational areas in the park would supplement recreational opportunities available to new residents. Mr. Blumberg believes the park's recreational facilities across the road from the subject property had been planned and were under construction when the Master Plan was adopted in 1997. He stated that there is plenty of evidence in the Master Plan that those recreational facilities were anticipated.

Mr. Blumberg described the surrounding area, which is developed primarily with multi-family residential uses in the R-30 Zone, mostly garden apartments with some condominiums. The property immediately north of the subject property is classified under the R-30 Zone. It was not recommended for rezoning in the Master Plan, because there was already an approved preliminary plan of subdivision for condominium townhouses on the property. That property is currently under contract to a developer who is planning to develop townhouse condominiums on that property, the property adjacent to it to the north (which is the subject of an approved subdivision plan under the R-T 8 Zone), and the property abutting the subject property to the south (which is the subject of an approved site plan under the R-T 8 Zone). Further north on Greencastle Road is a townhouse development in the R-T 10 Zone. The rest of the surrounding area (west of Greencastle Road) consists of multi-family housing in the R-30 Zone. Based on the existing land uses, Mr. Blumberg concluded that the proposed townhouse development would fit into the fabric of the surrounding area very compatibly.

With regard to the Master Plan, Mr. Blumberg testified that the subject property was part of an area that was recommended for a mix of detached and townhouse development. The area was recommended for rezoning from R-30 to R-60, but suitable to reclassification to the R-T 8 Zone.

The Master Plan recommended that properties in this area provide connections to open space on adjacent properties, to expand the open space along the tributaries to the Little Paint Branch, and that they incorporate the stream valley buffer into the open space. The Master Plan also called for setbacks and noise mitigation along Greencastle Road. Mr. Blumberg stated that the proposed development would implement the Master Plan's zoning recommendation, and would comply with its open space and stream valley buffer recommendations by placing the rear (eastern) portion of the property into a conservation easement that would connect to similar conservation areas on adjacent properties. The proposed development would implement the Master Plan's recommendations concerning road setbacks and noise mitigation at the time of site plan review.

Mr. Blumberg opined that the proposed development would satisfy the purpose clause of the R-T 8 Zone because it was designated for that zone in the Master Plan. Moreover, he concluded that the site is appropriate for residential development at densities allowed in the R-T Zones because of the character of existing and planned development in the surrounding area, and that the proposed development would be compatible with the area for the same reason. Mr. Blumberg noted that the proposed development would meet the applicable development standards for the R-T 8 Zone. Mr. Blumberg opined that a viable townhouse development can be built on the subject property that would meet or exceed the development standards for the Zone, even taking into account the size of the stream valley buffer. The development team for the present case participated in the establishment of the stream valley buffers on the properties to the south and the north and found that they could not achieve the maximum density permitted in the Zone because of the substantial conservation area. However, they concluded that a viable development can be built on the remaining land, in a manner compatible with and similar to neighboring developments.

Access to the subject property would be provided from Greencastle Road, like all of the properties that front on Greencastle. The maximum of 16 townhouses proposed for the subject property are expected to generate approximately eight vehicular trips during the morning peak hour and 13 during the evening peak hour, well below the 30-trip threshold that triggers a local area transportation review study. Mr. Blumberg stated that more specific traffic findings would be

addressed during subdivision review. He also noted that Greencastle Road, a narrow, two-lane highway with no shoulders for the most part, is scheduled under the County's Capital Improvements Plan for improvements that would bring it up to county standards for a two-lane arterial road, including curb and gutter, separate bike lanes and sidewalks and an 80-foot right-of-way. A small dedication from the subject property would be required to contribute to that right-of-way. Mr. Blumberg stated that the site design would accommodate this dedication, just as other developments on Greencastle Road have done. He also testified that the planned changes would improve the safety and capacity of the road, which would more than accommodate the traffic anticipated from the subject property.⁷

With regard to potential impact on the public schools, Mr. Blumberg testified that the maximum of 16 townhouses that could be built on the subject property under the R-T 8 Zone, ignoring the constraint of the conservation easement, would generate four elementary school students, two middle school students and three high schools students. The subject property would be served by Greencastle Elementary School, Benjamin Banniker Middle School and Paint Branch High School, all of which are within the northeastern consortium, which allows some flexibility in the distribution of students. Based on the pupil generation rate and the Council's AGP finding that all schools in the County have adequate capacity, Mr. Blumberg concluded that the proposed development would have a de minimus impact on schools.

2. Jeffrey Lewis, engineer

Mr. Lewis was designated an expert in civil engineering. He testified that with regard to the present application, he reviewed water and sewer availability, utility availability, stormwater management, forest conservation, sediment control and environmental issues, and forest conservation. He found that the property could be served by direct connection to a water main that runs along the property's Greencastle Road frontage. The property could receive sewer service either by direct connection to an existing sewer main in the stream valley, or by connecting through the

⁷ The Hearing Examiner notes that Mr. Blumberg was not qualified as an expert in transportation planning or traffic engineering, so there could be some question as to whether his testimony on this point should be considered expert testimony. The Hearing Examiner concludes that even if Mr. Blumberg's testimony concerning traffic issues were considered that of an educated lay person, it would be adequate, in the present

property to the south, avoiding the stream valley buffer. He expects that the Applicant's forest conservation obligation would be met by providing a forest conservation easement covering all the trees in the stream valley buffer. Mr. Lewis anticipates that stormwater management quality control requirements could be met on site, consistent with the treatment of surrounding properties. Detailed plans would be developed during subdivision review.

Mr. Lewis opined that the proposed development would satisfy the requirements for rezoning from a civil engineering standpoint, including the development standards for the zone.

3. Robert LoPinto, Applicant.

Mr. Lo Pinto represents TriCapital Partners, LLC, the Applicant. The Applicant was a contract purchaser when this application was filed, but has since become the fee owner. Mr. LoPinto testified that he learned from the daughter and son-in-law of the former owner that she objected to the rezoning that was proposed at the time of the sectional map amendment, because she and her husband were afraid that it would lead to higher property taxes.

Mr. LoPinto confirmed that the Applicant intends to develop the subject property with no more than 16 townhouses, probably fewer, and that they intend to fully incorporate the recommendations of the Master Plan. He agreed with Mr. Blumberg's conclusion that the subject property can be developed consistent with the applicable standards for the zone and with the Master Plan's recommendations in a way that is fully viable. Tr. at 48. He further testified that the Applicant has discussed its plans with the local neighborhood association and with the developer who is working on the adjacent properties, and has received only positive feedback on the proposal.

IV. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term "Euclidean" zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

case, to meet the Applicant's burdens of production and persuasion. Accordingly, we need not reach the issue

Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, i.e., it satisfies the purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

Montgomery County has many floating zones, including the R-T Zones. The R-T 8 Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as building location, landscaping and screening. The application of the zone to the subject property involves an evaluation of eligibility under the purpose clause, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

A. The Purpose Clause

The intent and purpose of the R-T Zone as stated in Code §59-C-1.721 is set forth below.

The purpose of the R-T Zone is to provide suitable sites for townhouses:

- (a) In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or
- (b) In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or

of the proper characterization for that testimony as expert or lay.

development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.

The Master Plan designates the subject property for development under the R-T 8 Zone. Moreover, the evidence supports the further conclusion that the subject property is appropriate for residential development at densities permitted in the R-T Zones, in light of the prevailing land use and zoning patterns in the surrounding area. The subject property is the only property remaining in the surrounding area with a single-family zoning classification, and the existing single-family home on the property is out of character with the area. The surrounding area is dominated by garden apartments and condominiums in the R-30 Zone. However, the properties on either side of the subject property are expected to be developed with townhouses and have approved subdivisions and site plans in place. In addition, the next property to the north is already developed with townhouses. Nearby developments have been built in the R-T 10, R-T 8 and R-30 zones, with densities of ten, eight and 14.5 dwelling units per acre, respectively. The proposed rezoning would complete development of the surrounding area west of Greencastle Road at a maximum of eight dwelling units per acre, the lowest density commonly found in the surrounding area. For all of these reasons, the Hearing Examiner agrees with the conclusion reached by the Planning Board and Technical Staff that the proposed development would be compatible with surrounding land uses.

The stream buffer conservation easement would be consistent with the intent of the R-T Zone to provide amenities normally associated with less dense zoning categories, as it would preserve a visual and perhaps recreational open space amenity. For the reasons discussed in the previous paragraph, the proposed development would be compatible with existing and planned land uses in the surrounding area. Accordingly, the evidence demonstrates that the proposed rezoning and development would be consistent with the intent of the R-T Zone to prevent detrimental effects to adjacent properties and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County.

B. Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. As discussed in the previous section, the Planning Board and Technical Staff found, and the Hearing Examiner agrees, that the proposed reclassification to the R-T 8 Zone would be compatible with existing and proposed development in the surrounding area.

C. Public Interest

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities.

The Planning Board and Technical Staff opined that the proposed development would be consistent with the Master Plan, and the Hearing Examiner agrees. The proposed reclassification would permit the implementation of a primary recommendation for the site in the Master Plan: development under the R-T 8 Zone. The Applicant’s representative and its land planner testified that the proposed development would follow all of the recommendations in the Master Plan, and confidently stated that this could be accomplished in a viable manner, even taking into account the substantial conservation easement.

The evidence supports a finding that the proposed development would have no adverse impact on traffic or local roadways. The development would generate only a small number of vehicular trips, and Greencastle Road is scheduled for significant improvements. While Technical

Staff did not specifically opine as to the effect of the proposed development on local roadways, Staff's recommendation that the application be approved indicates that they believe the application to be in the public interest. Moreover, the Planning Board's recent approval of two other townhouse developments in the immediate vicinity suggests that such development is appropriate in the area. While two of the high schools in the local high school consortium experience some overcrowding, no evidence was presented to suggest that the small number of students expected to be generated by the proposed development would have an adverse effect on school capacity. Moreover, the County Council determined in the FY 03-05 AGP Policy Element that school capacity is adequate to support additional residential development.

For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effect on public facilities that warrants denial of the application. In light of the strong evidence of compatibility and recommendations of approval from both the Planning Board and Technical Staff, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development bear sufficient relationship to the public interest to warrant their approval.

V. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I make the following conclusions:

1. The application satisfies the requirements of the purpose clause.
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area.
3. The requested reclassification to the R-T 8 Zone bears sufficient relationship to the public interest to justify its approval.

VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-821, requesting reclassification from the R-60 Zone to the R-T 8 Zone of 2.00 acres of land known as Lot 2, Seibel's Subdivision and located at 3961 Greencastle Road in Burtonsville, Maryland, in the 5th the Election District, be **approved** in the amount requested.

Dated: November 26, 2004

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner